

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Bamberg County

James R. Barber, III, Circuit Court Judge

FRANKIE LEE BRYANT,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2012-206008

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether there was any evidence to support the PCR court's finding that trial counsel was ineffective by failing to object to the erroneous jury instruction on the degree of force a defendant acting in self-defense is entitled to employ and that trial counsel's failure to object to this erroneous jury instruction prejudiced Respondent?

STATEMENT OF THE CASE

A Bamberg County Grand Jury indicted Respondent at the May 31, 2004 term of General Sessions for the offense of murder. App. 270-271. His case was called to trial on November 9, 2005 before the Honorable Doyet A. Early, III, and a jury. App. 3. Assistant Solicitor Benjamin Moore represented the state, and Kent Kirkland represented Respondent. App. 3. At the conclusion of the trial, the jury acquitted Respondent of murder, but found him guilty of the lesser included offense of voluntary manslaughter. App. 202, ll. 13-23. He was sentenced by Judge Early to twenty-five years imprisonment. App. 209, l. 23 – 210, l. 3.

The Court of Appeals dismissed Respondent's direct appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Bryant, Op. No. 2008-UP-574 (S.C. Ct. App. Filed October 14, 2008). On appeal, Respondent argued the trial court erred by giving the jury contradictory instructions on the amount of force a defendant may employ while acting in self-defense, but conceded the issue was not preserved for appellate review. See App. 278-284.

On October 12, 2009, Respondent filed an application for post-conviction relief (PCR) raising the issue argued in the Anders Brief of Appellant. App. 215-220. The state filed a return to this application dated March 9, 2010. App. 222-225. The matter proceeded to an evidentiary hearing on July 13, 2011 before the Honorable James R. Barber, III. App. 227. Assistant Attorney General Robert Corney represented the state, and Glenn Walters represented Respondent. App. 227. By order dated December 12, 2011, Judge Barber granted Respondent relief. App. 257-261.

The state filed a Petition for Writ of Certiorari with the South Carolina Supreme Court on June 21, 2012. Respondent filed a Return to the Petition for Writ of Certiorari on October 26, 2012. Assistant Attorney General David Spencer represented the state, and Glenn Walters represented Respondent. Our Supreme Court ultimately transferred this appeal to this Court pursuant to Rule 243(l), SCACR.

By order dated October 8, 2014, this Court granted the Petition for Writ of Certiorari and ordered further briefing pursuant to Rule 243(j), SCACR. Pursuant to this order, the state filed a Brief of Petitioner on October 17, 2014. Subsequently, the Office of Appellate Defense undertook representation of Respondent and undersigned counsel was assigned to the case.

This Brief of Respondent follows.

ARGUMENT

There was evidence to support the PCR court's finding that trial counsel was ineffective by failing to object to the erroneous jury instruction on the degree of force a defendant acting in self-defense is entitled to employ and that trial counsel's failure to object to this erroneous jury instruction prejudiced Respondent.

Facts at Trial

Sheila Oliver testified that she had been driving around with Willie Wright, the decedent, for a day and half before his death. Wright picked her up in Allendale and the two drove "to several different towns way out in the country." App. 55, l. 13 – 56, l. 11. While they were driving, the two were smoking crack cocaine and drinking beer. App. 56, ll. 18-20; App. 64, l. 12 – 65, l. 24. They would stop at various places and Wright would get out of his pickup truck to speak with friends, but Oliver always remained in the truck. App. 56, l. 18 – 57, l. 2.

At some point as they were "riding down the road," they saw Respondent and Wright said "Oh, there goes my cousin. I am going to give him a ride." App. 57, ll. 3-7. Wright stopped and picked up Respondent. When Respondent got into the truck, Oliver moved to the middle of the seat between the two men and Respondent sat on the passenger side while Wright drove. App. 57, ll. 8-13.

Oliver testified that after they picked up Respondent, they continued to drive around. As they were driving, Wright was bragging that he was "tougher and stronger" than Respondent and kept "talking about how strong he was." App. 57, ll. 21-23. Oliver testified that numerous times Wright pulled over on the side of the road, got out of the truck, walked to the passenger side, and "tussled" with Respondent. App. 57, ll. 14-17. She saw Wright

punch Respondent several times.¹ Not once did Respondent go over to the driver's side or initiate any of these "tussles." App. 67, l. 21 – 68, l. 9. Oliver testified that after each "tussle," the men would get back in the pickup truck and "[r]ide around like there ain't nothing happened." She said, "They wasn't upset or anything. Nobody was upset." App. 58, ll. 10-20.

Eventually the three drove to Bamberg and stopped at a place called the "back lot." At the back lot, the group picked up a fourth person, Anthony Gordon, who suggested they go to Nate Johnson's trailer around the corner to buy crack cocaine. App. 89, l. 15 – 90, l. 21. The accounts of what occurred at the trailer vary.

Oliver, whose testimony was significantly different than the other witnesses, testified that when the group drove to the trailer the seating arrangements were the same: Wright was driving, she was in the middle, and Respondent was sitting next to her on the passenger side in the cab of the truck. Gordon, the man they picked up at the back lot, was riding in the bed of the truck. Oliver claimed that when they arrived at the trailer, Wright parked right in front of the door to the trailer with the passenger side of the truck facing the home. She said Respondent "got out to let me out because I was sitting in the middle" and had to use the bathroom "because we were drinking beer." App. 58, l. 21 – 59, l. 18; App. 69, ll. 1-8.

Oliver testified that as she was walking to the door of the trailer, Wright "was coming around to his [Respondent's] side [of the pickup truck] to punch him again or whatever." App. 60, ll. 16-17. She claimed that Wright and Respondent "started fussing"

¹ Oliver testified that Wright was "very muscular" and "was much stronger than [Respondent] was from what [she] could see." App. 66, l. 24 – 67, l. 10. She later said Wright was much bigger "[m]uscular wise" than Respondent. App. 69, ll. 21-25.

and she saw a knife in Respondent's hand. App. 59, ll. 19-22. She immediately went into the house and when she returned from the bathroom, she saw Wright on the ground by the passenger side of the truck. He was bleeding "in the stomach area." They tried to stop the bleeding, but she knew Wright had to go to the hospital. Respondent and Gordon eventually helped her put Wright in the back of the pickup truck and she drove Wright to the hospital. App. 61, l. 17 – 62, l. 10.

Anthony Gordon testified that after Wright, Oliver, and Respondent picked him up at the back lot, they drove to Nate Johnson's trailer. On the way, Wright was driving, Oliver was inside the cab, and he and Respondent were riding in the bed of the truck. Gordon said that he was on the driver's side in the bed and Respondent was on the passenger side. App. 91, ll. 11-20; App. 98, ll. 4-14. According to Gordon, when they parked at the trailer, the driver's side of the truck was facing the trailer, not the passenger side as Oliver had claimed. App. 96, ll. 10-19.

Gordon testified that after they arrived at the trailer, he went inside looking for Nate Johnson. The individuals inside the trailer told him that Nate was not home. Gordon asked "them do they know anybody around here got anything [presumably drugs], and they said no, ain't nothing going on." Gordon said he "stepped back outside to let them [Respondent, Wright, and Oliver] know that nothing was going on." Once outside, he saw Respondent and Wright standing by the truck on the driver's side "bull jiving around." App. 92, ll. 6-16; App. 96, ll. 20-22. "At least [he] thought they was bull jiving around." App. 92, ll. 16-17.

Gordon claimed that he turned his back to Respondent and Wright and then Oliver walked up to him and asked if he thought the occupants of the trailer would let her use the bathroom. He told her he thought they would and she went inside. App. 92, ll. 19-25. The

next thing Gordon remembered was somebody screaming. He turned around and saw Wright “falling in the truck” and he eventually fell to the ground. App. 93, ll. 1-7. According to Gordon, Respondent was standing over Wright with a small silver knife in his hand. App. 93, ll. 9-13. Gordon did not see the stabbing and “didn’t even know he [Wright] was stabbed until I seen him lying down there and . . . you could see the blood coming out under his back.” App. 94, ll. 1-4. He admitted that he did not know who brought the knife to the fight and that he did not hear Respondent or Wright say anything to each other during the altercation. App. 100, ll. 1-11.

Gordon ultimately helped Oliver move Wright to the back of the pickup truck and drive him to the hospital. App. 94, l. 23 – 95, l. 3.

Antoinette Jenkins, who was at Nate Johnson’s trailer when the group arrived, testified that she had just woken up when a pickup truck pulled up to the home. App. 72, ll. 20-21. She said the truck parked right in front of the trailer with the driver’s side facing the residence. App. 75, ll. 1-10. Four people, three men and a woman, got out of the pickup truck, but Jenkins did not know them. She testified that the female passenger came into the trailer and asked to use the bathroom. App. 72, l. 22 – 73, l. 2.

Jenkins then claimed that two of the men outside began arguing and “starting fighting” on the driver’s side of the pickup truck. According to her, Wright was leaning “up against the corner of the [driver’s] door” which was opened. She claimed Respondent pulled out what looked like a pocket knife,” grabbed Wright on his shoulder and “just started stabbing him and then pushed him . . . inside the seat part, like where the seat is at in the truck.” She maintained that Respondent then backed up and Wright “fell on his back out

of the truck.” According to Jenkins, she heard Respondent say, “I told you.” App. 73, ll. 3-22. She did not hear Wright say anything.

Respondent, who took the stand in his own defense, testified that he and Wright were first cousins and were “very close.” App. 128, ll. 4-11. He explained that after Wright picked him up that day, they stopped at the store, bought some beer, and then headed to Bamberg. Respondent explained that they were going to Bamberg to meet his brother because his brother owed him money. App. 126, l. 12 – 127, l. 4. On the way to Bamberg, Wright pulled over several times on the side of the road and each time Wright “got out of his side of the truck, came on my side, and started hitting me.” App. 129, ll. 5-17. He said that Oliver’s account of these stops was accurate. App. 129, ll. 11-17. However, Respondent gave no explanation as to why Wright would stop the truck and hit him.

Once they got to Bamberg, the group stopped at a car wash where they met Respondent’s brother. His brother gave him a hundred dollars. App. 129, l. 18 – 130, l. 2. After leaving the car wash, Respondent testified that they went to the back lot where they met Gordon. They then drove to a trailer. Respondent explained that on the way to the trailer, Wright was driving and both he and Gordon were riding in the bed of the truck. He was on the driver’s side and Gordon was on the passenger side. App. 130, l. 7 – 131, l. 16.

When they got to the trailer, he and Wright “had some words” because Wright “wanted my money.” He told Wright that he “wasn’t going to give him none” and then the two “got in a fight.” Respondent testified that he “got from the bed of the truck on the ground by the driver’s side, and [Wright] busted my lip and started choking me.” He explained that Wright told him, “‘Give me your money, Frank [Respondent]. Give me your money.’ I said, ‘Oh, no.’ I couldn’t say nothing. I was trying to push him and push him,

trying to get loose from him.” App. 131, l. 17 – 132, l. 15. Respondent testified that he eventually “pushed him [Wright] against the driver’s side of the door. That’s when I [saw] he reached for a knife and he stabbed me right here.” App. 132, l. 16 – 133, l. 1. He showed the jury the three places where he was stabbed. App. 133, ll. 2-9. After he was stabbed, Respondent continued to try to “get loose” from Wright, but he “couldn’t get no air or nothing. So, I took the knife, tried to take the knife out of his hand.” While Wright was still choking him, Respondent was able to take the knife from him and stabbed him. Respondent did not know where he stabbed Wright or how many times. App. 133, l. 11-22. He maintained that the only reason he stabbed Wright was to “try to get loose from him . . . He was choking me.” App. 133, ll. 23-25.

After Respondent stabbed Wright, Wright let go of him and fell to the ground. Oliver, the female passenger, then moved Wright to the back of the truck and drove him to the hospital. App. 134, l. 21 – 135, l. 6. Respondent maintained that he was scared during the struggle over the knife and could not get away from Wright. Although, he had never “had trouble with [Wright] before,” he knew Wright had “beat up two people” in the past. App. 134, ll. 1-10. He also said that Wright outweighed him by about eighty pounds. App. 149, l. 25 – 150, l. 1; see App. 146, l. 23 – 147, l. 3.

Doctor Laura Knight, the pathologist who performed the autopsy, testified that Wright had a swallow stab wound to his upper right chest and a second stab wound to his left groin area. She explained that the wound to his groin severed the femoral artery causing tremendous blood loss. The cause of death was “cardiogenic shock and brain injury” from insufficient blood flow. App. 113, l. 25 – 114, l. 18. She later clarified that Wright bled to death. App. 117, ll. 19-21. Additionally, Knight testified that the toxicology results

indicated that Wright had alcohol and ephedrine or pseudoephedrine in his system when he died.² App. 119, l. 20 – 120, l. 6.

During closing argument, trial counsel argued that Respondent acted in self-defense when he took the knife from Wright during the altercation and that he only stabbed Wright, who continued to choke him, to protect himself from death or serious bodily injury. App. 175, ll. 22-24. During jury instructions, the trial judge included the following language at the conclusion of his charge on self-defense:

A person cannot be required to make an exact calculation as to the degree or amount of force which may be needed to avoid death or serious bodily harm. Therefore, in self-defense the defendant has the right to use the force needed to avoid death or serious bodily harm.

The force used in self-defense does not have to be limited to the degree or amount of force used by the victim. The defendant has the right to use so much force as appeared to be necessary for complete self-protection in which a person of ordinary reason and firmness would have believed to be needed to prevent death or serious bodily harm.

If the defendant is justified in defending himself, then the defendant is also justified in continuing to defend [himself] until it is apparent that the danger of death or serious bodily injury is completely ended.

And finally, in self-defense the degree of resistance ought to be in proportion to the nature of the injury offered; that is, that it should be sufficient to ward off such injury and do no more. In other words, the moment a man disarms or puts himself out of the power of the aggressor to do him further injury, then he should cease from further violence. But if he does commit any further outrage, then he becomes the aggressor.

² Upon his arrest later that evening, Respondent was taken to the emergency room where he gave a blood sample. The parties stipulated that the toxicology results from the blood sample were negative for alcohol, barbiturates, benzodiazepines, cannabis, cocaine, and opiates, meaning he had no drugs in his system. App. 136, l. 13 – 137, l. 22.

App. 197, l. 11 – 198, l. 12 (emphasis added).

Trial counsel made no objection to this instruction.

PCR Hearing

Trial counsel, Kent Kirkland, was the only witness to testify at the PCR hearing. He explained that Respondent's defense at trial was self-defense. App. 239, ll. 12-14.

Kirkland testified that at the end of all the testimony the state requested a jury instruction based on Golden v. State, 1 S.C. 292 (1870) and that the court agreed to instruct the jury accordingly. He explained, "Golden v. State says that the degree of resistance ought to be proportioned to the nature of the injury offered. That is, that it should be sufficient to ward off such injury and no more. For the moment a man disarms or put it out of the power of the aggressor to do him further injury, he ought to cease from further violence and if he does commit any further outrage, he then becomes the aggressor." App. 233, ll. 3-14. Kirkland admitted that this charge was an incorrect statement of the law and that he should have objected. App. 235, ll. 4-13; App. 242, l. 1. Moreover, he admitted that his failure to object to the erroneous charge was prejudicial to Respondent. App. 236, l. 19 – 237, l. 10; App. 238, ll. 9-14.

Kirkland stated that he thinks "the charge that was used . . . shifts the burden onto the Defendant to sort of stop once he had control. I believe the jury could clearly take that to mean that once he [Respondent] had control of the knife he somehow should have escaped and . . . they [the jury] could have believed that the burden was on him [Respondent] at that point to stop and go no further when the facts of the case would tend to show that that wasn't an option." App. 247, ll. 1-10. He further stated, "I think an individual charge can be

given among a dozen charges and that charge can be wrong and influence the trial, depending upon the facts of the case.” App. 249, ll. 13-16.

Order Granting Relief

The PCR court found that the degree of force charge given by the trial court was an incorrect statement of the law and that trial counsel was ineffective for failing to object to the erroneous charge. The court stressed that “a trial judge must charge the jury with the current and correct law of the State” and that “[m]erely superimposing a correct statement of law over an erroneous charge only fosters prejudice and confusion.” App. 260.

In addition to finding trial counsel ineffective, the PCR court also found that Respondent was prejudiced by counsel’s failure to object to the erroneous charge. App. 261. Consequently, the court reversed Respondent’s conviction and sentence and remanded for a new trial. App. 261.

Discussion

There was evidence to support the PCR court’s finding that trial counsel was ineffective for failing to object to the erroneous jury instruction limiting the degree of force permitted when one is acting in self-defense. There was also evidence to support the PCR court’s finding that trial counsel’s failure to object to this erroneous charge prejudiced Respondent.

“The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel.” Bailey v. State, 392 S.C. 422, 432, 709 S.E.2d 671, 676 (2011) (citing U.S. Const. amend. VI and Strickland v. Washington, 466 U.S. 668 (1984)). The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel. A “PCR applicant must show (1) counsel's

performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Under the second prong, the PCR applicant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

This court must “uphold the findings of the PCR judge when there is *any* evidence of probative value to support them, and will reverse the decision of the PCR judge when it is controlled by an error of law.” Bailey, 392 S.C. at 432, 709 S.E.2d at 676 (citing Suber v. State, 371 S.C. 554, 558-559, 640 S.E.2d 884, 886 (2007)) (emphasis added).

Here, the PCR court correctly found that trial counsel was ineffective for failing to object to the jury instruction limiting the amount of force Respondent was permitted to use during the altercation with Wright and ultimate struggle over the knife. Trial counsel was ineffective for failing to object to this instruction because it was an incorrect statement of the law. See State v. Robinson, 306 S.C. 399, 401, 412 S.E.2d 411, 413 (1991) (“The trial judge must charge the jury with the ‘current and correct law’ of the State.”); see also S.C. Const. art. V, § 17. An instruction limiting a defendant while he is acting in self-defense to the same force attempted to be used against him is erroneous.

In State v. Campbell, 111 S.C. 112, 96 S.E. 543 (1918), the defendant shot and killed a man who came at him with a glass bottle. The defendant claimed self-defense. The trial judge charged the jury that under self-defense the defendant was limited to using as

much force as was used against him. Our Supreme Court found the trial court erred in giving the charge and held:

A person assaulted, being without fault and bringing on the difficulty, has the right to use such force as is necessary for his complete self-protection ... The defendant, if without fault, had the right to use such necessary force as required for his complete protection from loss of life or serious bodily harm and cannot be limited to the degree or quantity of attacking opposing force.

Our Supreme Court reaffirmed this holding in Douglas v. State, 332 S.C. 67, 72-73, 504 S.E.2d 307, 309-310 (1998). Here, the state is attempting to bootstrap itself out of its error by citing to case law, which if it has not been expressly rejected, is inconsistent with later holdings by this Court and our Supreme Court on this issue.

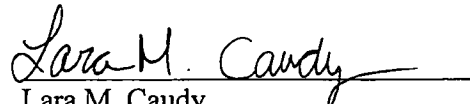
Not only was the charge given an incorrect statement of the law, it was also misleading and confusing to the jury because it was contradictory to the charge the court had given to the jury a moment before. See State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999) ("Merely superimposing a correct statement of law over an erroneous charge only fosters prejudice and confusion."). The state was attempting to destroy the defense of self-defense by adding a requirement that one in a deadly struggle somehow has the ability to determine, in a mathematical like fashion, that the struggle is over when a weapon has been taken from another. That is not the law of South Carolina and it was an obvious error that was highly prejudicial to Respondent. Simply disarming someone for a moment does not make it apparent that the threat of death or serious body injury has ended. The evidence showed that Wright was still choking Respondent at the time he got the knife from Wright and stabbed him.

Consequently, the PCR court's finding that Respondent was prejudiced by trial counsel's failure to object to the erroneous charge was correct. The PCR court correctly granted Respondent relief. Because there was evidence to support the PCR court's findings and no error of law was made, this Court should affirm the decision of the PCR court or, in the alternative, dismiss the matter as improvidently granted. See Bailey, 392 S.C. at 432, 709 S.E.2d at 676.

CONCLUSION

Respondent respectfully requests this Court affirm the decision of the PCR court granting Respondent relief. In the alternative, Respondent respectfully requests this Court dismiss the matter as improvidently granted.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 6th day of February, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Bamberg County
James R. Barber, III, Judge

FRANKIE LEE BRYANT,

RESPONDENT,

V.

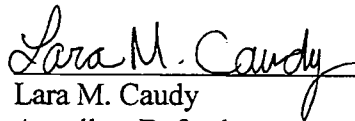
STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2012-206008

CERTIFICATE OF SERVICE

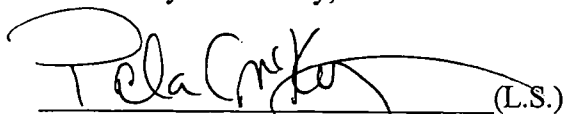
The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of February, 2015.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 6th day of February, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.